

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MANUELA SIERRA-ZUNIGA

Claimant

VS.

THE HAYES COMPANY, INC.

Self-Insured Respondent

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Docket No. 1,005,262

ORDER

Claimant appealed the January 20, 2004 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument in Wichita, Kansas, on July 20, 2004.

APPEARANCES

Lawrence M. Gurney of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, at oral argument to the Board, the parties agreed the Board should consider counsels' March 21, 2003 joint letter to Dr. C. Reiff Brown.

ISSUES

Claimant alleges she sustained permanent injuries to her right arm, right shoulder and head on May 29, 2002, when a piece of iron fell from above and struck her. The parties agreed that claimant's accident arose out of and in the course of employment with respondent.

In the January 20, 2004 Award, Judge Clark determined claimant had not sustained any permanent injuries due to the May 29, 2002 accident. Consequently, the Judge denied claimant's request for additional benefits.

Claimant contends Judge Clark erred. Claimant argues she has ongoing symptoms of pain from the accident and, therefore, the Board should find she has sustained a 7.5 percent whole person functional impairment.

Conversely, respondent argues the Award should be affirmed. Respondent contends claimant's complaints are non-physiological. Consequently, respondent argues claimant has failed to prove the May 2002 accident caused any permanent injury.

The only issues before the Board on this appeal are the nature and extent of claimant's injury and disability and whether the record includes Dr. Paul S. Stein's January 7, 2004 deposition and Dr. C. Reiff Brown's April 4, 2003 letter to both counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The January 20, 2004 Award should be affirmed. The Board concludes claimant has failed to prove that she sustained any permanent injury or permanent impairment as a result of the May 29, 2002 accident in which a piece of iron fell and struck her on the head and right shoulder. The Board adopts the Judge's findings and conclusions.

Respondent presented the testimony of Dr. Paul S. Stein, a board-certified neurological surgeon. Dr. Stein examined claimant on October 15, 2002. The doctor did not find evidence of increased intracranial pressure while checking claimant for a head injury. And while examining claimant for a neck injury or radicular symptoms, the doctor found no evidence of nerve root compression in the neck. Moreover, Dr. Stein concluded claimant did not need any permanent work restrictions or further medical treatment for either her head or neck.

At oral argument before the Board, claimant questioned whether Dr. Stein's deposition was part of the record as it was allegedly taken by respondent after its terminal date had expired. When respondent deposed Dr. Stein on January 7, 2004, claimant lodged her objection. At that time, respondent had filed a motion to extend its terminal date, which had expired on December 6, 2003, but respondent had failed to schedule the motion for hearing. Nevertheless, when respondent filed its submission letter with the Judge in early January 2004, respondent listed Dr. Stein's deposition as part of the record.

Conversely, claimant did not file a submission letter with the Judge and, therefore, the Judge was not aware of claimant's contentions at the time of submission regarding respondent's request to extend its terminal date or respondent's request to introduce Dr. Stein's testimony. Moreover, claimant did not renew her objection to including Dr. Stein's

deposition in the record after receiving respondent's submission letter, which listed the Stein deposition as part of the record. Furthermore, the record does not reflect that claimant ever objected to respondent's request to extend its terminal date. Finally, after making an objection at the deposition, claimant did not raise the issue again until the time of oral argument before the Board as neither claimant's application for Board review nor March 23, 2004 letter to this Board, which constituted her brief, challenged the Stein deposition.

Under these facts, the Board concludes the Stein deposition is part of the evidentiary record. First, the Judge listed Dr. Stein's deposition as part of the evidentiary record and, therefore, by implication the Judge granted respondent's request for an extension of its terminal date. Second, claimant failed to raise this issue to the Board in a timely manner and, therefore, the Judge's inclusion of the deposition should not be disturbed.

Claimant presented the testimony of Dr. Pedro A. Murati, who is board-certified in rehabilitation and physical medicine. Dr. Murati examined claimant in August 2002 and May 2003 and diagnosed myofascial pain syndrome affecting the neck and right shoulder and occipital neuralgia causing headaches. According to Dr. Murati, claimant sustained a 15 percent whole person functional impairment due to her May 2002 accident.

Finally, the record contains Dr. C. Reiff Brown's expert medical opinion. Dr. Brown, who is a board-certified orthopedic surgeon, examined claimant in April 2003 and concluded that none of claimant's complaints were supported by any objective evidence of pathology and her complaints did not follow any medical entity known to him. In his April 4, 2003 letter to both counsel, the doctor wrote, in part:

In my opinion this lady [claimant] suffered contusions to the right side of the head and laceration in the right temporal area[,] probable contusion of shoulder, arm and right thoracic area of the spine. She has a multitude of complaints that are persisting even at this date, nearly a year post injury. None of these complaints can be supported by any objective evidence of pathology and her complaints do not follow any medical entity known to me. Some of her symptoms are simply unexplainable on an organic basis such as the subjective numbness in a glove-like distribution in the right upper extremity, pain in various areas of the skull, frontal area, right arm by her description are not on an organic basis and cannot be attributed to any entity. In my opinion this lady does not need any additional medical attention. I am in agreement with Drs. Pollock, Stein and Poole that her complaints are non-organic, unattributable to any pathologic entity that could be attributed to this injury. The Fourth Edition of Guides to Evaluation of Permanent Impairment would certainly not allow the placement of any permanent injury. No work restrictions are indicated.

In the January 20, 2004 Award, Judge Clark determined Dr. Brown's April 4, 2003 letter was part of the evidentiary record. At oral argument before the Board, the claimant for the first time challenged Dr. Brown's medical report as being part of the record. Neither claimant's application for Board review nor letter brief to the Board contested the admissibility of the medical report.

At oral argument before the Board, the parties presented a copy of their joint March 21, 2003 letter to Dr. Brown. The letter, which was signed by claimant's counsel, reads in part:

Dear Dr. Brown:

The Court has ordered an independent medical examination (IME) of the above-referenced claimant. The purpose of the IME is to obtain your opinion on treatment recommendations, if any, the amount of permanent impairment of function, if any, and any permanent restrictions, sustained by [claimant] as a result of her work-related injury while employed by [respondent]. . . .

The Board concludes the above letter acts as a stipulation that Dr. Brown would examine claimant as if he were a court-appointed neutral physician. Accordingly, the Board affirms Judge Clark's finding that Dr. Brown's letter should be considered part of the record under K.S.A. 44-516. Claimant's belated objection to Dr. Brown's letter is disingenuous and without merit. Moreover, claimant also failed to raise that issue to the Board in a timely manner and, therefore, the Board finds no reason to disturb the Judge's recitation of the record.

Considering the record as a whole, the Board concludes claimant has failed to prove that she sustained permanent injuries as a result of her May 2002 accident. Consequently, the January 20, 2004 Award should be affirmed.

AWARD

WHEREFORE, the Board affirms the January 20, 2004 Award entered by Judge John D. Clark.

IT IS SO ORDERED.

Dated this ____ day of August 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
 Terry J. Torline, Attorney for Respondent
 John D. Clark, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director